IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 17/07/2003

CORAM

THE HONOURABLE MR.JUSTICE M.KARPAGAVINAYAGAM

CRL.A.No.906 of 1996
and CRL.A.Nos. 907 and 908 of 1996

K.R.Subramanian .. Appellant in all the appeals

-Vs-

V.A.Arumuganathan .. Respondent in all the appeals

Criminal Appeals against judgments dated 26-8-1996 in C.C.Nos.266 of 1993, 1656 of 1992 and 1722 of 1992 on the file of the Court of Judicial Magistrate No.5, Madurai.

!For appellant : Mr.P.Raja for M/s.S.Subbiah

^For respondent: Mr.R.S.Ramanathan

:COMMON JUDGMENT

Since all these three appeals relate to common issue, common judgment is being delivered in these appeals.
2. The appellant/complainant, aggrieved by the judgments, acquitting the respondent/accused in three complaints, has filed these three appeals.
3. The facts which are simple are as follows:
The complainant made some payments to one Ramamurthy on different dates. When the amount was demanded by the complainant, Ramamurthy handed over the cheques endorsed, which were drawn by the respondent Arumuganathan and issued in favour of Ramamurthy. These cheques were presented on different dates and the same were dishonoured. Statutory notices thereupon were issued to both Ramamurthy, the endorser and Arumuganathan, the drawer. Reply notices were sent with false allegations. Hence, the appellant/complainant was constrained to file three separate complaints.
4. In all the three cases which were separately tried, the complainant was examined as P.W.1 and a bank witness was examined as P.W.2 and A-2 Arumuganathan was examined as D.W.1.
5. Though the complainant chose to implicate the said Ramamurthy, who is the endorser of the cheques, as A-1 before the commencement of trial, the complainant, the appellant herein withdrew the complaint as against A-1 Ramamurthy. Therefore, the trial went on only as against the respondent Arumuganathan, who was originally arrayed as A-2.
6. The trial Court, after conclusion of trial, acquitted the accused

in all the three cases, on the basis of two grounds, namely (i) The cheques were dishonoured twice at different dates, but there was no notice sent by the complainant with reference to the first dishonour and so, this is illegal and (ii) Though the respondent Arumuganathan was the drawer of the cheques, the cheques were handed over by Ramamurthy as endorser to the complainant and the said Ramamurthy was not examined as a witness either by the complainant or by the accused to prove the actual transaction. Challenging these grounds, the complainant has chosen to file these three appeals.

7. Mr.P.Raja, learned counsel appearing for the appellants, while assailing the judgments impugned, would contend that both the grounds relied on by the trial Court are not valid and as such, the judgments impugned have to be set aside and the respondent/accused has to be convicted. In order to substantiate his plea, he would cite the following decisions:-

(i) SADANANDAN BHADRAN VS. MADHAVAN SUNIL KUMAR (AIR 1998 SC 3043);

(ii) Y.SREELATHA @ ROJA VS. MUKANCHAND BOTHRA (2002 (1) LW (Crl.) 271);

(iii) GUMMADI INDUSTRIES LTD. & ANR. VS. KHUSHROO F.ENGINEER (2000 (1) Crimes 1) and

(iv) K.MANI VS. ELUMALAI (2002 (3) LW 845).

8. In reply to the above submissions, Mr.R.S.Ramanathan, learned counsel appearing for the respondent, while justifying the grounds of acquittal, would contend that in one complaint, i.e. in C.C.No.1722 of 1992 in Crl.A.NO.908 of 1996, the complainant would admit that he issued a notice for the first dishonour and as such, the acquittal in respect of C.C.No.1722 of 1992 has to be sustained on the ground that the complaint cannot be maintained for the second dishonour, as already cause of action has arisen. On the strength of a decision of the Supreme Court reported in AIR 1961 SC 1316 (KUNDAN LAL VS. CUSTODIAN, EVACUEE PROPERTY), learned counsel would submit that under Section 1 18 of the Negotiable Instruments Act (hereinafter referred to as ' the Act'), though presumption would arise in favour of the party who approaches the Court, when once it is rebutted by the other party, the burden of proof shifts on the party complained to prove the transaction by producing documentary evidence in support of his claim. He would also point out various portions of the evidence to show that even assuming that the grounds of acquittal are not valid, since P.W.1 has not established the offence under Section 138 of the Act through acceptable evidence, the judgments of acquittal could be sustained on the said ground.

9. I have heard learned counsel for the parties and also gone through the records.

10. At the outset, it shall be stated that both the grounds mentioned in the judgments impugned for acquitting the accused, are not valid in law.

11. In regard to the first ground that no notice for the first dishonour was issued by the complainant, it is to be stated that there should be only one notice by which demand is made, which may give rise to the cause of action for non-payment of the cheque amounts, despite receipt of the notice. Admittedly, in this case, only for the second dishonour, statutory

notice had been issued and the same was received by the accused, and as such, there was only one cause of action. Of course, it is true, as correctly pointed out by learned counsel for the respondent, that in one complaint in C.C.No.1722 of 1992, it has been averred that even for the first dishonour, a notice was issued and the same was received. But, in the deposition, P.W.1 would specifically deny in cross-examination that such a notice was issued for the first dishonour. A reading of deposition of P.W.1 as a whole would make it clear that there was only one notice, which is for the second dishonour of cheque. The averment made in the complaint that notice was issued for the first dishonour, is purely a mistake. Therefore, this Court cannot take the same as a ground to hold that the complaint is not maintainable on that score. Thus, it is clear that there is only one notice issued by the complainant, which is the statutory notice, after getting intimation from the Bank for dishonour and such notice was received by the accused, who did not choose to make payment within the stipulated time. So, the first ground would fail.

12. Secondly, the trial Court would observe that Ramamurthy is the endorser, that the cheques were drawn by Arumuganathan and that the said Ramamurthy was not examined either by the complainant or by the accused. It is the case of the complainant consistently through the complaint as well as in the deposition that Ramamurthy has endorsed the cheques which were drawn by the respondent-accused in favour of the complainant towards the discharge of liability. There is no dispute in the fact that the respondent/accused has drawn the cheques and handed over the same to Ramamurthy. When once the signature of the accused in the cheques has been admitted, naturally, the presumption would arise as against the drawer by virtue of Section 139 of the Act. Under those circumstances, the presumption which has arisen, has to be rebutted by the accused, the drawer, by producing materials to show that the cheques were not issued by him in favour of the said Ramamurthy towards the discharge of any liability. If that be the situation, there is no necessity for the complainant to examine the said Ramamurthy with reference to the liability, inasmuch as Section 139 of the Act would clearly state about the presumption with reference to the legally enforceable debt or liability.

13. Learned counsel for the respondent, as noted above, on the strength of the decision reported in AIR 1961 SC 1361 (supra), would submit that when once the presumption has been rebutted by the other party, the burden of proof shifts on the party complained to prove the transaction by adducing additional documentary evidence. The Supreme Court in that decision would observe as follows:

"5 ....
....
The burden of proof as a question of law rests, therefore on the plaintiff; but as soon as the execution is proved, S.118 of the Negotiable Instruments Act imposes a duty on the Court to raise a presumption in his favour that the said instrument was made for consideration. This presumption shifts the burden of proof in the second sense, that is, the burden of establishing a case shifts to the defendant. The defendant may adduce direct evidence to prove that the promissory note was not supported by consideration, and, if he adduced the acceptable evidence, the burden again shifts on the plaintiff and so on."

These observations were made on the basis of Section 118 of the Act and

Section 114 of the Evidence Act. This decision would not apply to the present facts of the case for two reasons. Firstly, the decision is an appreciation of materials in the civil case. Secondly, the case on hand would relate not only to the presumption under Section 118 , but also under Section 139 of the Act.

14. As a matter of fact, the Supreme Court, in AIR 2001 SC 3897 (HITEN P.DALAL VS. BRATINDRANATH BANERJEE), while referring to the judgment reported in AIR 1961 SC 1316 (cited supra), would lay down the distinction between "presumption" under Section 118 of the Act and Section 139 of the Act. Relevant observations are as follows:-

"21. Because both Sections 138 and 139 require that the Court "shall presume" the liability of the drawer of the cheques for the amounts for which the cheques are drawn, as noted in STATE OF MADRAS VS. A.VAIDYANATHA IYER, AIR 1958 SC 61, it is obligatory on the Court to raise presumption in every case where the factual basis for raising of the presumption had been established. "It introduced an exception to the general rule as to the burden of proof in criminal cases and shifts the onus on the accused" (ibid). Such a presumption is a presumption of law, as distinguished from a presumption of fact which describes provisions by which the Court "may presume" a certain state of affairs. ....

23. Judicial statements have differed as to the quantum of rebutting evidence required. In KUNDAN LAL RALLARAM VS. CUSTODIAN, EVACUEE PROPERTY, BOMBAY, AIR 1961 SC 1316, this Court held that the presumption of law under Section 118 of Negotiable Instruments Act could be rebutted, in certain circumstances, by a presumption of fact raised under Section 114 of the Evidence Act. The decision must be limited to the facts of that case. The more authoritative view has been laid down in the subsequent decision of the Constitution Bench in DHANVANTRAI BALWANTRAI DESAI VS. STATE OF MAHARASHTRA, AIR 1964 SC 575, where this Court reiterated the principles enunciated in STATE OF MADRAS VS. VAIDYANATHA IYER, AIR 1958 SC 61 (supra) and clarified that the distinction between the two kinds of presumption lay not only in the mandate to the Court, but also in the nature of evidence required to rebut the two. In the case of discretionary presumption if drawn may be rebutted by an explanation which "might reasonable by true and which is consistent with the innocence" of the accused. On the other hand in the case of a mandatory presumption "the burden resting on the accused person in such a case would not be as light as it is where a presumption is raised under S.114 of the Evidence Act and cannot be held to be discharged merely by reason of the fact that the explanation offered by the accused is reasonable and probable. It must further be shown that the explanation is a true one. The words 'unless the contrary is proved' which occur in this provision make it clear that the presumption has to be rebutted by 'proof' and not by a bare explanation which is merely plausible....."

15. When a similar question arose before this Court, I had an occasion to consider the same and give a distinction between the presumption of law and presumption of fact. The same is reported in 2002 (1) L.W. (Crl.) 271 (supra). Sections 118, 138 and 139 of the Negotiable Instruments Act would require that the Court "shall presume" the liability of the drawer of

the cheques for the amount for which the cheques were drawn on accepting the consideration. Thus, it is obligatory on the Court to raise this presumption in every case where the factual presumption has been established. Such a presumption is a presumption of law, as distinguished from a presumption of fact, which describes provisions by which the Court "may presume" on certain state of affairs. In other words, when the prosecution provided the facts required to form a basis for presumption, no discretion is left with the Court to draw the statutory conclusion in favour of the complainant. In the case of a discretionary presumption, the presumption if drawn may be rebutted by an explanation which "might reasonably be true and which is consistent with the innocence" of the accused. On the other hand, in the case of a mandatory presumption, "the burden on the accused person" would not be light, as one cannot be held to be discharged merely by reason of the fact that the explanation offered by the accused is reasonable and probable. The words "unless contrary is proved" contained in Sections 118 and 139 of the Negotiable Instruments Act would make it clear that the presumption has to be rebutted by 'proof' and not by a bare explanation, which is merely plausible. Unless the explanation is supported by proof, the mandatory presumption created by the provision cannot be said to be rebutted.

16. Therefore, the decision reported in AIR 1961 SC 1316 (cited supra) by the counsel for the respondent, on the basis of Section 114 of the Evidence Act in which it has been stated "may presume", regardless of the fact that the sentence in Section 138 of the Act and Sections 118 and 139 of the Act would clearly postulate that it "shall be presumed", unless the contrary is proved, would be of no use to the defence.

17. As indicated above, a conjoint reading of Sections 118 and 139 of the Act would clearly indicate that when once the cheque has been drawn by the drawer and when the same has been established, it "shall be presumed" that the "holder" of the cheque received the cheque of the nature referred to in Section 138 of the Act for the discharge in whole or in part of any debt or any other liability.

18. As a matter of fact, P.W.1, the complainant in all the cases would give details about the transaction between Ramamurthy and himself by adducing oral evidence with regard to the liability. It has also been established that the cheques have been signed by the respondent/accused and the same were handed over to Ramamurthy, who is the endorser. Except the evidence of D.W.1, the accused who merely stated that he handed over the blank cheques to Ramamurthy, which were in turn endorsed in favour of the complainant, nothing was produced to rebut the presumption, which has arisen in this case to indicate that there was no liability either to Ramamurthy or to the complainant.

19. At the end, an interesting argument has been advanced by learned counsel for the respondent-accused, contending that the complainant, the appellant herein, cannot be considered to be the "holder" of the cheques and as such, Section 139 of the Act would not get attracted in this case. According to him, Section 139 of the Act would provide that "it shall be presumed, unless the contrary is proved, that the "holder" of a cheque received the cheque of the nature referred to in Section 138 for the discharge in whole or in part, or any debt or other liability" and in this case, the "holder" Ramamurthy alone can invoke this Section 139 and the presumptive clause under Section 139 would not apply to the complainant, who is merely a

'holder in due course". Learned counsel would also point out the distinction between the definition of "holder" as contained in Section 8 of the Act and the definition of "holder in due course" as mentioned in Section 9 of the Act.

20. Though at the first blush, the abovesaid argument advanced by learned counsel for the respondent is quite attractive, a thorough probe into the definitions in Sections 8,9 and 139 of the Act, would clearly show that there is no force in the said argument. It is true that the definition of "holder" and "holder in due course", is given in two different Sections. As per Section 8, the "holder" of a cheque means any person entitled in his own name to the possession thereof. The definition of "holder in due course" as mentioned in Section 9 of the Act gives the meaning that any person who for consideration, became the possessor of cheque, if payable to bearer. Section 139 of the Act would indicate that it "shall be presumed", unless the contrary is proved, that the "holder" of a cheque received the cheque of the nature referred to in Section 138 of the Act for the discharge, in whole or in part, or any debt or other liability.

21. A conjoint reading of these three Sections would, in my view, indicate that the word "holder" given in Section 139 of the Act would include "holder in due course" also, as he alone would be entitled to initiate criminal proceedings under Section 138 of the Act as soon as he gets the said cheque from the holder as an endorser for the purpose of consideration. As per the provisions of Section 15 of the Act, the maker or holder of a cheque can sign for the purpose of negotiation, in favour of a third party and the said transaction is called "endorsement". Section 138 of the Act would postulate that where any cheque drawn by a person on an account maintained by him for payment of any amount of money to another person from out of his account for the discharge of his liability, is returned by the Bank as the same is insufficient to honour the cheque, such person shall be deemed to have committed the offence.

22. In this case, admittedly, the cheques have been drawn by the accused and the same were endorsed by him in favour of Ramamurthy, who becomes the holder of the cheques. Further, in this case, admittedly, the holder of the cheque, namely payee, has not filed the complaint. On the other hand, the holder endorsed the cheques for the purpose of discharge of liability in favour of the com plainant, namely the holder in due course as defined in Section 9 of the Act and handed over the same to him.

23. A reading of proviso (b) to Section 138 of the Act would give the clear answer for the above question. According to that proviso, before launching prosecution in respect of the offence under Section 1 38 of the Act, the payee or the holder in due course of the cheque, as the case may be, shall make a demand for payment of the amount by giving a notice in writing to the drawer of the cheque.

24. In this case, the complainant admittedly, the holder in due course, has demanded the cheque amounts through statutory notice from the respondent, who had drawn the cheques.

25. The object of Section 139 of the Act, giving rise to the presumption, would indicate that the complainant could give minimum materials to be placed before the Court while dealing with the offence committed under Section 138 of the Act. If an interpretation has been given for the wordings contained in Section 139 of the Act that the presumption would apply only to the holder and not to the holder in due course, then it would amount to

defeating the object, thereby showing discrimination between holder and holder in due course with reference to the launching of the prosecution against the drawer under Section 138 of the Act. Therefore, the said argument of learned counsel for the respondent would also fail.

26. In view of the above discussion, the judgments impugned, which would suffer from infirmities referred to above, have to be set aside. Accordingly, the impugned judgments are set aside. The appeals are allowed. The respondent/accused is convicted for the offence under Section 138 read with 142 of the Negotiable Instruments Act.

27. As the respondent/accused is convicted by this Court, it would be necessary for this Court to question the respondent/accused with reference to the sentence. Hence, the respondent-accused is directed to appear before this Court on 8-8-2003 to enable this Court to question him in regard to the sentence.

28. Post the matter on 8-8-2003 with regard to question of sentence of the respondent-accused.

Index: Yes
Internet: Yes

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To
1.Judicial Magistrate No.5, Madurai.
2. -do- through the Chief Judicial Magistrate, Madurai.